PCL Construction, Ltd. *and* **Dennis M. Carlstrom.**
Case 18-CA-7529

7 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 3 February 1983 Administrative Law Judge James T. Youngblood issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) by threatening an employee with plant closure because he complained about a jurisdictional work assignment and by threatening an employee with discharge because he questioned the assignment of overtime, and violated Section 8(a)(3) by failing to recall an employee because of his protected activities. We disagree.

The Respondent is a contractor on a large construction project which is divided into five separate segments. The Respondent operates each segment entirely with unionized employees.

Before commencing work, the Respondent's officials met with representatives of the various unions, including Laborers Local 563, whose members were to be utilized on the project. According to the testimony of the Laborers business agent, "[e]verything [at the Respondent's project] has gone very well as far as Local 563 is concerned."

Charging Party Carlstrom, a laborer belonging to Local 563, began work on segment A in June 1980. He initially drove a power buggy in a cement pouring operation. However, he repeatedly failed to run his buggy at full speed, thereby slowing down the operation and causing fellow workers to bear a greater share of the work. This was noted by management as well as employees, who complained about Carlstrom's failure to keep his power buggy in rotation.

Foreman Charest reassigned Carlstrom to sweeping, but found him inefficient at that job also. And as a puddler Carlstrom's work was so poor that cement finishers asked that he be removed from puddling because his performance increased their workload.

In early November 1981 Carlstrom observed two carpenters performing laborers and cement finishers work. Upon learning that Construction Superintendent Nelson had instructed the carpenters to do the task, Carlstrom asked Acting Foreman Dalbec to contact Nelson. Shortly after speaking to Dalbec, Carlstrom told Foreman Christian about the work the carpenters were doing. Christian immediately agreed with Carlstrom and assigned him to the laborer's job. Carlstrom took it upon himself to send for the cement finishers steward to take over the finisher's job.

As Carlstrom and the finishers steward worked, the two carpenters, who remained in the area waiting for them to finish, heckled Carlstrom—in Carlstrom's words, "giving me a hard time verbally relative to my ability to do my job and my integrity in checking the cards of laborers." During a break, Carlstrom spoke to Dalbec about the "hard time" he was receiving from the carpenters. Dalbec replied, "[W]ell screw it then, we will shut the God damn job down, you might as well clean up the tools and end the operation."

On 16 November 1981 Carlstrom learned that his crew had worked overtime 13, 14, and 15 November. Since he had not been asked to work overtime, he contacted the Union to complain.[2] Later in the day Carlstrom and union representatives met with Field Manager Barnert, Foreman Charest, and other management officials. Carlstrom accused Charest of not offering him overtime, and Charest claimed that Carlstrom refused overtime whenever it was offered. This bickering between the two continued until Barnert interjected that there were too many problems coming out of segment A, that he felt it was a problem between the two of them, and that the best way to resolve the situation was to get rid of both of them. The meeting broke up without any decision being made. Later, Barnert came to Carlstrom and apologized for having "blown his cork."

On 19 November 1981 segment A was completed, and the remaining five or six laborers, including Carlstrom, were laid off. At its peak, as many as 25 or 30 laborers were working on segment A.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Carlstrom was a steward. Under the collective-bargaining agreement, according to an arbitrator's decision, the Respondent was supposed to offer overtime work first to a steward, if he was qualified.

In December 1981 the Respondent began construction on another part of the overall project. Some of the laborers who had worked on segment A were recalled. Carlstrom was not recalled. At the time of the hearing there were approximately 16 laborers working on the new construction.

The judge found that Dalbec's statement "was clearly in response to Carlstrom's complaint over the jurisdictional work assignment" and as such constituted a threat in violation of Section 8(a)(1). He also found that Barnert's statement was a "threat to terminate Carlstrom . . . in direct response" to his asserting rights under the collective-bargaining agreement, and was violative of Section 8(a)(1). And he found that the Respondent's failure to recall Carlstrom was "at least in part" due to his support and activities on behalf of the Union, and therefore was a violation of Section 8(a)(3).

We believe the judge erred, factually, in his analysis of the evidence.[3] Regarding the Dalbec statement, the judge misperceived the context in which it was made. That statement about shutting down was in response to Carlstrom's complaint about his difficulties with the carpenters. Carlstrom objected to the fact that the carpenters remained in the area and heckled him after he had been assigned the laborer's task. When he complained to Dalbec about the "hard time" the carpenters were giving him, Dalbec responded in exasperation that, if Carlstrom and the other workers could not handle their interpersonal problems, the job would have to be shut down. Contrary to the judge's finding, it is clear from Carlstrom's own testimony that his concern about carpenters doing laborers work was dealt with promptly by Christian in complete accord with Carlstrom's desires.[4]

Having found that Dalbec's statement was directed at Carlstrom's complaint about personal difficulties rather than predicated on any protected activity, we reverse the judge's conclusion that the Respondent violated Section 8(a)(1) by threatening Carlstrom in response to Carlstrom's complaint over the jurisdictional work assignment.

Nor do we agree with the judge's conclusion that Barnert's statement was "in direct response to [Carlstrom's] union activities." It is clear, in fact, that Barnert's remark grew out of and was "in direct response to" the squabbling between Charest and Carlstrom, and had nothing to do with Carlstrom's protected activities. The event occurred towards the end of construction of segment A. Barnert was concerned that meetings were taking up much of his time. He viewed the bickering between Charest and Carlstrom as detrimental to the project's timely completion. His angry exclamation cannot be explained without paying attention to this context.

Our finding that Barnert's remark was not directed at any protected activity is supported by Carlstrom's own testimony. According to him, Barnert stated that he wanted to get rid of both Charest and Carlstrom. Had Carlstrom's protected activity been the reason for Barnert's statement, Barnert would not have included a supervisor as well as Carlstrom in his angry indictment. We believe the explanation which makes the statement internally consistent with the circumstances is that Barnert was addressing the apparent proclivity of Charest and Carlstrom to argue and bicker fruitlessly. Moreover, Barnert's subsequent apology (to which Carlstrom testified) for having "blown his cork" lends further credence to our conclusion that Barnert's statement was a spontaneous outburst generated by the immediate squabbling and consequent delays, having nothing to do with any protected activity.

Having found that Barnert's statement was not linked to any concern about protected activity, we reverse the judge's finding that the Respondent violated Section 8(a)(1) by threatening to discharge Carlstrom because of his union activity.

Finally, we cannot agree with the judge's conclusion that the failure to recall Carlstrom to work on the new construction violated Section 8(a)(3). We believe the Respondent has come forward with sufficient evidence to rebut the General Counsel's prima facie case that Carlstrom was not recalled because of protected activity.[5] Carlstrom was a slow and inefficient worker. Management sought to reassign him, but his problems continued even when assigned fairly basic tasks such as sweeping. Other employees complained that his slowness

[3] We note that the General Counsel introduced background information regarding certain conduct occurring in 1980 and early 1981, which he apparently believed would shed some light on the conduct alleged to be unlawful. In some cases, of course, background information may be helpful to explain ambiguous and equivocal conduct occurring within the 10(b) period or to shed light on a respondent's motivation where the respondent has failed to establish bona fide business reasons for its conduct. See *Our-Way, Inc.*, 244 NLRB 236 fn. 2 (1979). In the instant case we believe the Respondent provided bona fide business reasons for its conduct, and we therefore find it inappropriate to infer any unlawfulness in its conduct based on the background information.

[4] We repeat that, according to Carlstrom's own testimony, the remark by Dalbec was linked to Carlstrom's complaint about the carpenters' heckling him rather than his concern about misassignment of laborers work. The record contains no evidence that the Respondent encouraged the carpenters to give Carlstrom a "hard time."

We note in passing that Dalbec's status was that of an employee who apparently became acting foreman when no other foremen were present, and that this happened only a few times over the year and a half he was on the job. Carlstrom was aware of this and certainly could not have taken seriously such a person's suggestion that he would shut down the project.

[5] The judge failed to analyze this issue in accordance with *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

made their jobs more difficult. We find that this evidence supports the Respondent's assertion that it considered Carlstrom a marginal worker.

When the Respondent began work on the new construction, it recalled some (but not all) of the laborers who had worked on segment A,[6] and those it recalled were considered some of the best who had worked on segment A. The General Counsel made little or no effort to rebut the evidence that Carlstrom was considered a marginal worker.[7] Based on this record, we find that the Respondent came forward with sufficient evidence to show that it was dissatisfied with Carlstrom's work on segment A and would not have recalled him even in the absence of any protected activity. Accordingly, we shall dismiss the 8(a)(3) allegation.

ORDER

The National Labor Relations Board orders that the Respondent, PCL Construction, Ltd., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening union stewards or other employees that their jobs are in jeopardy because of their union or concerned activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its construction projects at the City Center project in Minneapolis, Minnesota, and all other places where the Respondent is engaged in business in Minneapolis, Minnesota, copies of the attached notice marked "Appendix:"[8] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations not found herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything to interfere with these rights. More specifically

WE WILL NOT tell union stewards or other employees that their jobs are in jeopardy because they have engaged in union activities protected under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

PCL CONSTRUCTION, LTD.

DECISION

STATEMENT OF THE CASE

JAMES T. YOUNGBLOOD, Administrative Law Judge. The complaint which issued on January 26, 1982, alleges that PCL Construction, Ltd. (herein called PCL or the Respondent), engaged in conduct violative of Section 8(a)(1) of the Act, and refused to recall Dennis M. Carlstrom from layoff because he joined, supported, or assisted Laborers International Union of North America, Local Union No. 563, AFL-CIO (herein called the Union), or otherwise engaged in concerted activities, in order to discourage membership in the Union and in

[6] At the time of the initial recalls, according to the judge, the Respondent recalled all but one laborer (that one being Carlstrom) who had been working on segment A when it was completed. That he remained on segment A until its completion is not necessarily an indication of the Respondent's regard for him. Carlstrom was the steward and, under the contract, the Respondent could not lay off the steward until the entire crew was laid off.

[7] The judge notes that, in filling out his separation notice, the foreman indicated that he would recall Carlstrom. We find little significance in this fact. Particularly given the unrebutted testimony regarding the Respondent's dissatisfaction with Carlstrom's work, we are not prepared to conclude that the separation notice represents an admission that Carlstrom was one of the better laborers who worked on segment A.

[8] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

order to discourage employees from engaging in such activities in violation of Section 8(a)(3) of the Act. The Respondent filed an answer denying the commission of any unfair labor practices. This matter was tried before me on September 1 and 2, 1982, in Minneapolis, Minnesota. All parties were represented at the hearing and the General Counsel and the Respondent filed post-trial briefs which have been duly considered.

On the entire record and on my observations of the witnesses and their demeanor and on the briefs filed by the parties, I make the following

FINDINGS AND CONCLUSIONS[1]

I. THE BUSINESS OF PCL

PCL is a Canadian corporation with an office and place of business in Minneapolis, Minnesota, where it is engaged in the building and construction industry. In the spring of 1980 PCL began working on the Minneapolis City Center project which involves the construction of a parking lot (segment A), a 52-story office tower (segment B), a 3-story department store (segment C), and retail space (segment D). Additionally, on this site PCL is also constructing a 32-story hotel (AMFAC Hotel). PCL admits, and I find, that at all times material herein it has been an employer engaged in commerce withn the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

PCL admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

In June 1980, Dennis Carlstrom was hired by PCL as a laborer to work on the Center City Project. Initially, he worked on segments A, B, and C. In September or October 1980, Carlstrom was assigned to segment A only. Carlstrom was initially assigned as a truckdriver and also performed other general labor duties. In August 1980, Carlstrom was appointed steward for all of segments A, B, and C, which were the only segments in progress at that time. Later in October or November 1980, Carlstrom's stewardship was reduced to cover only segment A. Other stewards were appointed for the other segments.

When Carlstrom became the steward he was designated to serve on the Respondent's safety committee, which is composed of all stewards, foremen, superintendents, the safety director, and project manager. Carlstrom took full advantage of his membership on the safety committee and soon after his appointment as steward he complained of the unsafe storage and location of oxygen, acetylene, and gasoline. In October 1980, when Carlstrom was introducing a new steward to Ron Williams, the general foreman of segment B, he pointed out a number of unsafe conditions he had observed at segment B. Williams asked Carlstrom who "in the hell" he thought he was, and stated that he did not want Carlstrom "pulling any OSHA inspections" on him, and that he did not like the idea of Carlstrom taking notes while in his area.

Following an OSHA inspection which was held in December 1980, the OSHA inspectors met with union stewards, without the benefit of any representatives of the Respondent. The subjects raised by the stewards were brought up by the OSHA inspectors when they met with representatives of the Respondent and the stewards. After the December 1980 OSHA inspection, the Respondent held a meeting with its employees in the lunchroom. Foreman Ballentine and Segment A Manager Paul Nelson advised the employees that the Respondent was getting "sick and tired of the tail wagging the dog. They were getting tired of the agitation that was going on constantly. They had authorization to fire each and every person on the job if they needed to in order to get rid of the agitators." Ballentine explained that PCL did not care about the employees' feelings and stated that "if the employees didn't like it there they should leave."

Following this meeting Carlstrom complained about the statement made by Ballentine and Nelson to Steve Gardner, the newly appointed personnel director.

In November 1980, Carlstrom approached Foreman Tom Charest and inquired about his views on granting overtime to the stewards, particularly to Carlstrom. Charest informed Carlstrom that he could arrange for him to work on weekends but not overtime during the week. Carlstrom interpreted the collective-bargaining agreement as requiring the presence of a steward at all times when employees are working and that if there is any overtime worked a steward must be present. Management disagreed with Carlstrom's interpretation and this disagreement was an additional obstacle between the Respondent and Carlstrom. The overtime assignments became a critical point with Carlstrom and he had on occasions discussed the problem with representatives of the Respondent including Charest, Nelson, and Ballentine. Also he discussed this with union business agents. Carlstrom ultimately requested the Union to file a formal grievance over the matter. Early in February 1981, the Union filed a formal grievance over the Respondent's overtime assignments.

When Charest later approached Carlstrom and informed him that he had heard that Carlstrom was suing him, Carlstrom advised that he was not suing Charest, but merely pursuing a grievance concerning overtime. Charest responded that if Carlstrom were going to sue him he had better get his "shit together because he had a lot of dirty jobs he could assign."

In mid-February 1981, a grievance meeting was held between the Union and the Respondent to discuss the overtime claim of Carlstrom. Ballantine, Charest, and Paul Nelson were present on behalf of the Respondent,

[1] The facts found herein are a compilation of the credited testimony, the exhibits, and stipulations of fact, viewed in light of logical consistency and inherent probability. Although these findings may not contain or refer to all of the evidence, all has been weighed and considered. To the extent that any testimony or other evidence not mentioned in this Decision may appear to contradict my findings of fact, I have not disregarded that evidence but have rejected it as incredible, lacking in probative weight, surplusage, or irrelevant. Credibility resolutions have been made on the basis of the whole record, including the inherent probabilities of the testimony and the demeanor of the witnesses. Where it may be required I will set forth specific credibility findings.

and Joe Byrd and Howard Johnson represented the Union. During this meeting Carlstrom confronted management about rumors that it was attempting to have employees circulate petitions seeking Carlstrom's removal as steward. Ballantine indicated that he did not know the employees could not do that, and stated that he thought it was permissible.

On October 28, 1980, Carlstrom was given a warning/dismissal notice for being 8 minutes late for work by Foreman Burndt, who informed Carlstrom that he was acting at the behest of Ballantine. Carlstrom then confronted Ballantine who informed Carlstrom that it was for frequent tardiness. In this conversation Ballantine told Carlstrom he was "taking on too many responsibilities as a steward." Carlstrom credibly testified that on several occasions he had been threatened by Ballantine as not being "fire proof."

In addition to his complaints to the Company about overtime assignments, safety, and other related issues, Carlstrom was also involved in so-called jurisdictional work assignments. In early November 1981, a nonunion cleaning company was working on the project, in violation of the collective-bargaining agreement, at least according to Carlstrom. Carlstrom advised the Union and his foremen and shortly thereafter the cleaning crew was removed and replaced by a union cleaning crew. Additionally, in early November 1981, when Carlstrom discovered two carpenters doing what is traditionally laborers and cement finishers work, he notified the cement finishing steward and Bob Dalbec, the acting foreman. He requested that Dalbec contact Nelson on his two-way radio. Prior to this, Michael Christian, the carpenter foreman, appeared at this site, and when Carlstrom pointed out that carpenters were doing work that should be performed by laborers and cement finishers, Christian told Carlstrom "okay, you mix the mud." While Carlstrom and the cement finishing steward were undertaking to perform the job the carpenters remained at the site and subjected them to verbal abuse. Carlstrom then advised Dalbec and Christian that he did not need the carpenters standing around giving him a hard time, and that they were doing the job for less cost to the Respondent than it was performed by the carpenters. At this point Dalbec reacted by telling Carlstrom to "screw it then, we will shut the goddamn job down, you might as well clean up the tools and end the operation."

This last remark by Dalbec is alleged in paragraph 5,a of the complaint to be a violation of Section 8(a)(1) of the Act. There is little doubt that both Dalbec and Christian were upset over this complaint by Carlstrom, and Christian merely responded that Carlstrom was making it "goddamn" hard to work around there. Carlstrom attempted to get Christian to clarify what his problem was. Christian merely turned his back and walked away. Later that day, Carlstrom learned from a fellow employee that Christian was telling employees he had nearly "decked" Carlstrom over the dispute involving the carpenters work.

There is little doubt that Dalbec's statement was clearly in response to Carlstrom's complaint over the jurisdictional work assignment and involved concerted activities and union activities and clearly constitutes a threat of a job shutdown in violation of Section 8(a)(1) of the Act, and I so find.

According to the credited testimony of Carlstrom he was concerned for his safety after hearing that Christian was going to hit him and he contacted the union officials requesting one of them to accompany him back to work on Thursday, November 5, 1981. Unable to get an official to go to work with him he advised the Respondent that he would not be in that day. Likewise, he did not report on November 6, 1981. He did report to work on Monday, November 9, 1981, under the impression that union official Howard Johnson would be at the site that day. At 10 a.m., when Johnson had not appeared at the site, Carlstrom attempted to reach him at the union office but was unsuccessful. He then left the jobsite pending a resolution of this matter. Ultimately a meeting was set up between the Union, the Respondent, and Carlstrom for 3 p.m., November 10, 1981. According to Carlstrom, he informed those in attendance that he was being socially ostracized, that threats were being made on the job against people who associated with him, and that he was continually denied overtime in violation of the collective-bargaining agreement and the arbitrator's award of October 30, 1981.[2] Also, Carlstrom explained the incidents of November 4, which occurred over the work assignment dispute involving the carpenters. Christian did admit stating that he should have decked Carlstrom, and the Respondent's representatives treated the threat very lightly.

In September 1981, the Respondent fired employee Kathleen Nikunen. The Respondent's personnel manager, Stanley Gardner, heard rumors that Carlstrom had advised Nikunen to undertake legal action against the Respondent, and Gardner called Nikunen to find out if this was true. Nikunen related this conversation to Carlstrom, and Carlstrom informed Gardner that his conduct bothered him, and suggested that Gardner check out such rumors with Carlstrom directly. Gardner then asked Carlstrom if he had directed Nikunen to the press, which Carlstrom denied.

Carlstrom met again on November 11, 1981, with Stanley Gardner, who wanted to know if Carlstrom would be requesting time off the next day to attend a Minnesota Human Rights Commission meeting concerning Nikunen. When Carlstrom indicated that he would be attending, Gardner stated that they were not going to pay him for the time that he took off to attend the meeting. Carlstrom had not asked to be paid for that, but he became curious and asked why he would not be paid. Gardner replied that it would be ludicrous for the Respondent to pay Carlstrom to attend and testify against the Respondent. Carlstrom had talked to Gardner and other supervisors on other occasions concerning alleged sexual harassment and discrimination. Gardner admitted this conversation with Carlstrom and stated that he did indicate to Carlstrom that he did not feel that this type

[2] The grievance which Carlstrom had filed in February was ultimately decided in October by an arbitrator who sustained the grievance and required PCL to offer overtime to the steward if he was qualified to do the work being offered to others in the bargaining unit.

of conduct was within his duties and responsibilities as a steward.

On November 12, 1981, the Minnesota Human Rights Commission held a factfinding hearing at its office in St. Paul, Minnesota. Christian, Charest, and Gardner were present for the Respondent. Nikunen, her counsel, and Carlstrom were also in attendance. Gardner was upset over Carlstrom's testimony at the hearing and immediately on the conclusion of the hearing he confronted Carlstrom in the lobby of the building. Gardner informed Carlstrom that he was sick and tired of Carlstrom going outside of his jurisdiction as steward and getting involved in matters that were none of his business. Gardner told Carlstrom that he was coming at him on this one and that Carlstrom had put himself in jeopardy. Carlstrom asked if this meant the possibility of losing his job and Gardner asked if he even cared about his job. Carlstrom responded that he did care, he cared a great deal, and Gardner knew that.[3]

The complaint alleges this statement by Gardner to be a violation of Section 8(a)(1) of the Act. It is clear that Garnder was upset over Carlstrom's testimony, and it is also clear that Carlstrom was engaged in protected activities in giving testimony for the Human Rights Committee. Garnder's statement to Carlstrom that he had put himself in jeopardy was clearly a threat, and interfered with his Section 7 rights and was violative of Section 8(a)(1) of the Act, and I so find.

Carlstrom worked on November 13, 1981, but was not asked to work any overtime on that day or the next 2 days. On Monday, November 16, 1981, Carlstrom learned that all of the other members of his crew had worked overtime on those 3 days and also on the morning of November 16, 1981. He immediately contacted the union hall and approximately 30 minutes later was summoned to a conference room next to the office of Gerald Barnert. Carlstrom met with Nelson, Charest, and Barnert and the union business agent, Johnson, was on the telephone with a loudspeaker attachment. Barnert commenced the meeting by asking Charest why Carlstrom had not been offered overtime and Charest responded that Carlstrom frequently refused to work overtime. A second meeting was scheduled for later in the day so that the union representatives could be physically present. At this meeting Nelson, Charest, Barnert, Gardner, business agent Johnson, and Carlstrom were present. Again Charest was asked why Carlstrom had not been asked to work overtime. On this occasion Charest said that Carlstrom was running around Friday afternoon taking his steward report. Barnert responded that it was Carlstrom's duty and responsibility to take a steward report, and asked Charest and Nelson why, as everyone knew that overtime would be required a week ago, Carlstrom was not informed. Charest again claimed that Carlstrom had refused to work in the past. Carlstrom then explained that he would concede that fact, if Charest would admit that he had refused to offer Carlstrom overtime for the last 6 months.

[3] Gardner denies this part of the conversation. However, I do not credit this denial. Carlstrom's testimony had more of a ring of truth and seemed more straightforward.

At this point, Barnert stated that he wanted to get rid of both Charest and Carlstrom because there were too many problems coming out of segment A. Business agent Johnson asked if Barnert meant to fire the employees or lay them off. Barnert said lay them off, and Johnson asked if it would be effective immediately or at the end of the day. At this point Joe Byrd, the financial secretary for the Union, intervened and suggested Barnert reconsider his actions as it involved terminating a steward. No agreement or resolution was reached on any of the issues and the meeting broke up.

The complaint alleges that Barnert's threat to terminate Carlstrom is in direct response to his union activities in violation of Section 8(a)(1) of the Act. There is little doubt that Carlstrom was merely asserting his rights under the collective-bargaining agreement by complaining about the failure of Charest to assign him overtime and a threat by Barnert to get rid of him because of this problem certainly interfered with Carlstrom's rights guaranteed under Section 7; such interference and threat of discharge is clearly violative of Section 8(a)(1) of the Act, and I so find.

Carlstrom continued to work on the project until approximately 3:15 p.m., November 19, 1981, when Charest approached Carlstrom and another laborer, handing them their checks and stating that they were being laid off. Charest explained that everyone was being laid off. Within a few days all the laborers who had been laid off were returned to work with the exception of Carlstrom.

Carlstrom testified that on November 25, 1981, he went to the City Center project and talked to Barnert. He asked the reason for his termination and was informed for lack of work. Carlstrom testified that he noticed other laborers whom he had worked with in the preceding week and who had been laid off were working on the project at the AMFAC Hotel. It is conceded by the Respondent that all laborers were returned to work except for Carlstrom, and that there are presently 16 laborers working at the AMFAC Hotel and that shortly before and after November 19, 1981, laborers were transferred to segments B and C.

The complaint alleges that the failure to recall Carlstrom to work following his layoff was because he joined, assisted, or supported the Union and engaged in concerted activities in order to discourage employees from engaging in such activities in violation of Section 8(a)(3) of the Act.

Discussion and Conclusions

It is clear that at the time Carlstrom was laid off from work the reason given was lack of work. In filling out Carlstrom's separation notice Foreman Charest indicated on the form that he would rehire Carlstrom. Nelson reviewed and executed this separation notice without making any correction. Prior to Carlstrom's layoff on November 19, 1981, there was never any mention of a deficiency in his work, as being a contributing factor to his layoff. Also, on November 25, 1981, when Carlstrom visited Barnert he did not suggest that any such deficiency entered into PCL's reasons for refusing to recall Carlstrom. Thus, the only reason given to Carlstrom that he

was not recalled to work was because of lack of work. However, the Respondent now asserts that the reason that Carlstrom was not recalled to work was because of the deficiency in the quality and quantity of his work. Thus, the Respondent's witnesses testified that Carlstrom performed in a slow manner, that his work performance was poor, and that his work was so bad that at one point they considered making him a sweeper. Most of the Respondent's witnesses testified that Carlstrom's constant complaints about safety matters, overtime matters, and the general performance of his duties as a union steward had nothing to do with the Respondent's failure to recall Carlstrom. The only reason given for failing to recall him is because he is a lousy employee.

While the hard feelings between Carlstrom and Charest is readily apparent in this record, it is also worthy to point out that the Respondent's hostility to Carlstrom and his activities was not restricted in this regard. It is noted that in April 1981, Nelson or Barnert requested Charest to prepare a memo on Carlstrom's conduct. Charest prepared such a memo and admitted that he had never done this on any other employee. In the memo Charest implies that Carlstrom had been involved in a crew walkoff at another project in 1979, and described various overtime complaints made by Carlstrom and how Carlstrom would call in the union business agent. Charest concluded by stating that Carlstrom had agitated the men for a long time, and put a "great deal of friction with the men and foremen" and concluded that "it would be best if he was let go." There was no mention or criticism of Carlstrom's performance or ability, other than Charest stating that Carlstrom was an average laborer who had his mind on other things that did not concern him.

Nelson testified to observing Carlstrom's performances claiming that he was slower than other employees. However, he did nothing to investigate the problems or correct the alleged deficiency. In fact none of the supervisors testified that they ever gave Carlstrom any verbal or written notice or warnings, other than a warning for being 8 minutes late. On March 2, 1981, Nelson wrote a memo to Barnert regarding Carlstrom, in which he discussed Carlstrom's charges of no overtime on the City Center project, concluded that "I feel he was a very disruptive influence on the Crew in particular and the job in general. For these and more reasons, I feel we should and must let him go." In his response to this memo, Barnert gives a clue to Carlstrom's ultimate destiny by stating, "rather than cause problems why don't you try and get along with the man until your job is completed, you are running a separate job there and when you are done you are done." Thus, it is apparent that the Respondent was looking forward to the ultimate completion of segment A to rid itself of Carlstrom.

I have carefully reviewed this entire record including all of the testimony of the witnesses and have carefully observed their demeanor while testifying. Once again we are confronted with the age old situation of an employee, and in this case the union steward for the job, attempting to correct what he considered to be unsafe conditions on a job, inequities in the application of overtime, and incorrect assignments of work by craft jurisdiction. Management does not like this type of disruptive conduct on the part of its employees and their attempts to correct these problems are rarely rewarded. In fact, the employee who becomes the chronic complainer very often finds himself a target of management's wrath. In this case Carlstrom quickly got on the list of Foreman Charest, and ultimately on the list of other PCL supervisors at the City Center project. I am convinced that whatever poor qualities may have been involved in Carlstrom's performance of his work that these shortcomings did not enter into or at least were not the principal factor in his termination, or in the Respondent's failure to recall him. His termination is not alleged to be unlawful, but the failure of the Respondent to recall him is alleged to be a violation of the Act because it was based on unlawful considerations. It is obvious to me, based on this record as a whole, that the Respondent's failure to recall Carlstrom was at least in part based on the fact that he was a disruptive influence on the job through his concerted activities and his activities on behalf of the Union and his fellow employees. In fact, Barnert ultimately admitted that Carlstrom's filing of grievances, participating in OSHA proceedings, complaining about safety on the job, and thus being a constant thorn in the Respondent's side during his employment, entered into their decision not to rehire or recall Carlstrom. Such conduct clearly discourages membership or activities on behalf of labor organizations in contravention of the Act. Therefore, it is my conclusion that the Respondent failed to recall Carlstrom to work on the City Center project on and after November 25, 1981, because of his support and activities on behalf of the Union and because of his concerted activities, in order to discourage membership in the Union in violation of Section 8(a)(1) and (3) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent described above, occurring in connection with its operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that the Respondent's failure to recall Dennis Carlstrom to work on the City Center project on and after November 25, 1981, was discriminatory in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that the Respondent be ordered to immediately recall, rehire, or fully reinstate him, unless reinstatement has already been offered, to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole for any loss of earnings he may have suffered as a result of the Respondent's discrimination against him in the manner set forth in *F. W.*

Woolworth Co., 90 NLRB 289 (1950), with interest computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).[4]

On the basis of the foregoing findings of fact and on the entire record, I make the following

CONCLUSIONS OF LAW

1. The Respondent, PCL Construction, Ltd., is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Laborers International Union of North America, Local Union No. 563, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to shut the job down because Carlstrom had engaged in union activities and concerted activities with other employees by attempting to enforce the collective-bargaining agreement, by threatening employees with unspecified reprisals and discharge because the employees had testified in support of another employee at a Human Rights hearing, and by threatening to discharge an employee because the employee had engaged in union activities and concerted activities with other employees by attempting to enforce the collective-bargaining agreement, the Respondent has engaged in conduct violative of Section 8(a)(1) of the Act.

4. By refusing to rehire, recall, or reinstate employees or union stewards because of their union activities or other concerted activities, on behalf of the Union or any other labor organization, or by discriminating in regard to hire or tenure of employment to discourage membership in the Union, the Respondent has engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices effecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

[4] See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).